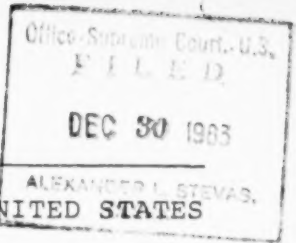


NO. 83-916



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

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BRIEF IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
FEDERAL CIRCUIT

---

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CORRECTION OF THE  
QUESTION PRESENTED

Whether the United States Air Force may take the pay of one of its members and pay it over to such member's former wife on the basis of a void judgment of a state court, the judgment being void for lack of in personam jurisdiction over such member, when the Air Force knew the said state court's judgment was void before it first took such member's pay, and after taking such member's pay be immune from suit by the member against the Air Force for such member's military pay?

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BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND  
JUSTICES OF THE SUPREME COURT OF  
THE UNITED STATES:

Comes now ALLAN WAYNE MORTON, by  
Counsel, and files this his Brief in  
Opposition to the Petition for a Writ of  
Certiorari filed by the United States in  
this cause and, as grounds therefor,  
respectfully states as follows:

This case was brought against the  
United States (Air Force) to recover a  
Military Member's pay pursuant to Title  
37, Sec. 204 et seq., United States Code  
and the Fifth Amendment to the  
Constitution of the United States.

(R.App.1a ) (P.App.A-1a). The Defendant  
continues, however, to state that the  
government was held liable in damages  
for honoring a Writ of Garnishment void

for lack of jurisdiction over Col. Morton. The monetary award is not damages but the restoration of the member's pay and allowances which the Air Force wrongfully failed to pay him. It is settled that a member of the military may sue for his pay and allowances in the Court of Claims (Claims Court). Bell v. U.S., 366 U.S. 393. The United States' defense was that it took his pay and allowances pursuant to 42 U.S.C. 659. It is the subject matter of the Petition, Complaint, Declaration, Motion for Judgment, or whatever it may be called in the various courts, that determines the jurisdiction of the court over the subject matter of the lawsuit and not the subject matter of the defense. Louisville & Nashville R.R. vs. Mottley, 211 U.S. 149 (1908). This is a military pay case and not a domestic relations case. The government is also incorrect in its argument that the lower court's decisions

put the Federal Courts into the business of domestic relations. It is the Congress of the United States in enacting 42 U.S.C. 659 that put the United States into the business of garnishing pay for alimony and child support out of which arises a claim for such pay. This suit arose because the Respondent's military pay was not paid to him. The government's contentions are, putting it quite simply, that 42 U.S.C. 659 and its later amendments authorize it to take the pay of one of its members on the basis of what the Air Force knew, before it took the pay, was a void judgment.<sup>1</sup> In other words, the government's position is that 42 U.S.C. 659 authorizes their

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<sup>1</sup>The Air Force was not only notified that the judgment and writs were void but it was also furnished the entire record of the Alabama case which showed the lack of any valid service of process under Alabama law. (P. App. 39a, para 8).

taking of the pay and allowances of a military member without due process of law and in spite of the fact that the government is aware that the taking was without due process of law when the taking occurred.

That the Alabama judgment for alimony and child support and the writ of garnishment issued pursuant thereto are void is not questioned nor argued by the government in its Petition before this Court. Indeed, such an argument would be difficult in face of the facts in this case. Col. Morton was not personally served with process to bring him before the Alabama court (P.App.89(a)); he was not a domiciliary of Alabama when the suit was filed (P.App.71a); he had no "minimum contacts" with Alabama when the suit was filed (P.App.78a); there is no evidence Col. Morton committed any act against the marriage in Alabama (P.App.90a), and the

Mortons last lived together in Virginia (P. App.85a); Alabama had no "long-arm statute" for alimony and child support when the Alabama suit was filed (P.App.93a, 94a) except of course the Uniform Reciprocal Enforcement of Support Act, and Col.Morton made no appearance of any kind in the Alabama divorce suit. (P.App.89a). To this must be added the facts that the Alabama suit was dismissed prior to judgment for lack of prosecution and the dismissal set aside without any Notice to Col.Morton, (P.App.89a), and that Col.Morton paid \$500 per month voluntarily to Patricia Kay Morton from the date of their separation until the garnishment of his pay began, (P.App. 88a, 89a). The initial garnishment was for \$4,100.00, which amount Col. Morton could not have owed, assuming the Alabama court had had jurisdiction over him by virtue of the fact he had

voluntarily paid Mrs. Morton. The Air Force knew all of this prior to the taking of Col. Morton's pay. (P.App.66a). It must also be noted that there was no affidavit filed among the Alabama suit papers concerning Col. Morton's Military status, and no guardian ad litem appointed for him in accordance with Section 200 of the Soldier's and Sailor's Civil Relief Act, 50 U.S.C. App.Sec.520. (P.App.89a).

The arbitrariness of the United States in the administration of Col. Morton's pay is amply and repeatedly shown from the record. The clear language used in 42 U.S.C. 659, effective January 1, 1975 stated that the obligations that could be honored by the United States had to be "... legal obligations to provide child support or make alimony payments." (Emphasis added). The statute was initially silent as to the liability of the government for wrongful and illegal taking of the property of a

military member or employee. (R.App.2a ).

In 1975 the Department of Defense Pay Manual Section 70710. Garnishment of Pay for Enforcement of Child Support and Alimony Obligations, (R.App. 3a ), made it clear to the military that garnishment of a member's pay had to be based on an order by a court of competent jurisdiction. The Air Force cannot claim ignorance of its own Regulations, Department of Defense Regulations being binding on the Air Force.

Between the time of the initial enactment of 42 U.S.C. 659 in 1975 and the amendment of it in 1977 there had already been at least one suit against the United States concerning this statute, Popple v. U.S. 416 F.Supp.1227 (1976) and at least two more cases filed and ready for decision, Overman v. U.S. 563 F.2d 1287 (1977) and Calhoun v. U.S. 557 F.2d 401 (1977). Congress had the opportunity to totally exempt the government from any liability

by merely saying any order received by the government for garnishment of a member's pay will be honored by the government and there shall be no liability on the part of the government for honoring any order for alimony and child support. Congress did not do that. It added subsection (f) (P.App.98a) which is very clear that the United States shall enjoy immunity with respect to these payments "... made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." (Emphasis added). When Congress amended 42 U.S.C. 659 in 1977, it also repeated and reiterated the phrase, "... legal obligations to provide child support or make alimony payments." (Emphasis added). (P.App.99a), it added Definitions in Section 662 (b) and (c), (b) defining child support

and (c) defining alimony. (R.App. 3a ). The Congress again made it quite clear that the government may only honor "legal obligations", as a result of a "judgment issued in accordance with applicable State law by a court of competent jurisdiction." The Congress also defined "legal process" used in 42 U.S.C. 659(a) in subsection (e) (P.App.98a-99a) as that process issuing from a court of competent jurisdiction.

The statute by its own terms defines what alimony and child support are for the purposes of this Act. No matter what other definition there may be, in Federal garnishment proceedings, we are limited to these definitions. Pursuant to 42 U.S.C. 659, there is no alimony or child support unless it issues from a Court of competent jurisdiction. In order to insulate the defendant from liability, orders and decrees honored by the defendant must be from a court of competent jurisdiction and

must be legal process regular on its face issued from a court of competent jurisdiction. The immunity of the United States for taking a member's pay is, therefore, by clear terms of the statute, a limited immunity. In stating very clearly in what situations the United States could not be sued, Congress obviously rejected any contention that it could never be sued. The enumerations of exclusions from the operation of a statute indicate that the statute should apply to all cases not specifically excluded, Ex Parte McCardle, 7 Wall. (74 U.S.) 509; Stephens v. Smith, 10 Wall (77 U.S.) 321. The legislative history of the 1977 amendments to 42 U.S.C. 659 made it quite clear that the amendments were to clarify the act. Section 501 of Public Law 95-30 contained the amendments. Public Law 95-30 was the Tax Reduction and Simplification Act of 1977. As introduced, it contained no provisions concerning garnish-

ment, H.R.3477, 95th Cong.1st.Sess.1977;  
Senate Report No.95-66, 5 U.S. Code Cong.  
& Adm.News 751 (1977). Section 501 of the  
act was added to the amendments on the  
floor of the Senate, (125 Cong.Rec. S.6722)  
by Senator Nunn who said,

"The intent of these amendments  
that I am introducing today will  
be to clarify the garnishment  
provisions to provide for administrative  
improvements and to aid in the evaluation  
of the program."

A general explanation was included in the  
Congressional Record, Part A., "Clarification  
of Garnishment Provisions" stated the object  
of Section 501 (the amendments to 42 U.S.C.  
659] was to clarify existing law. 125 Cong.Rec.  
S6723, April 29, 1977. The question thus  
arises why Congress felt the need to clarify  
42 U.S.C. 659 By these amendments if the  
government's position is correct;  
that is that even if the government knows  
the judgment of the State Court which issued  
the writ is void, the government owes no

duty to its military members and is obligated to take his property and give it to the wife or former wife of such member upon receipt of a copy of this void writ because it is on a regular form issued by the State Court. For such a position as the government's, no interpretation or clarification by amendment of the statute was needed. Congress, by amending the statute to read that the government would not be liable when it honored a State Court Order if the writ was legal process regular on its face, issued by a Court of competent jurisdiction, intended to insulate the government from suit when they honored a "voidable" judgment as opposed to a "void" judgment, void because the Court issuing it had no jurisdiction of the subject matter or no jurisdiction over the defendant to enter such an order. The fact that the amendments to 42 U.S.C. 659 fail to state that the government is totally, unequivocally, and

completely immune from liability for the taking of a military member's or its employee's pay is not error of omission on the part of Congress. The amendment was clearly an attempt to make the statute, 42 U.S.C. 659, constitutional in its application by assuring that the military member or its employee is afforded due process of law. To accept the government's position is to license the denial of due process of law by the United States. No such intent should or could be attributed to Congress. The Illinois Supreme Court in Herb v. Pitcairn, 384 Ill.237, 51 N.E. 2d 277, 280 explains the distinction between "void" and "voidable" judgments as follows:

"It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the Court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. Rabbitt v. Weber & Co., 297 Ill.491, 130 N.E.787. And we have further held that even a

Court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the particular act or judgment is brought within its jurisdiction according to law. People ex rel. Brundage v. Righeimer, 298 Ill.611, 132 N.E. 229. These are general principles upon which substantially all courts are in agreement."

The cases cited by the government in its Petition are all distinguishable from the case at bar. Overman v. U.S. 563 F2nd 1287, did not allege nor prove that the garnishment was based on a void judgment. Neither was Overman a suit for pay and allowances wherein the Federal Court had subject matter jurisdiction. It was alleging the underlying judgment was based on fraud. If proven, it is, thus, a voidable judgment to be set aside by the Court entering it.

Jizmerjian v. Dept. of Air Force, 457 F.Supp.820 (1978) App'd.607 F2d 1001 (1979) Cert.den.444 U.S.1082 (1980) is factually different in that Mr.Jizmerjian

appeared in the Arizona Court in the underlying divorce case. The Arizona Court had jurisdiction over him and once having jurisdiction, such jurisdiction continues. Cunningham v. Department of the Navy, 455 F. Supp.370 (1978), Popple v. United States, 416 F.Supp.1227 (1976) and Snapp v. U.S. Postal Service - Texarkana (1982) <sup>664 F2d 1329</sup> are distinguished from the case at bar in that the cause of action alleged in the case at bar is one for military pay, whereas Cunningham, Popple and Snapp based their causes of action on 42 U.S.C. 659 which the courts have held did not grant a cause of action. The cause of action of the Plaintiff in a law suit is the factor that determines whether the court has subject matter jurisdiction. Although Calhoun v. U.S. 557 F.2d 401, cert.den.434 U.S.966 (1977) was a claim for military pay, the government's reliance on it is misplaced. In the Calhoun case the service of process

for the support award was in accordance with the laws of California, the state from which the judgment issued. California had a long-arm statute. California Code, Sec. 415.40. There was no notice given in that case to the Navy (U.S.) that Mr. Calhoun was not a domiciliary of California. To the contrary, Mr. Calhoun did not offer the Court any evidence of where he was domiciled. The Court in Calhoun held that "the fact of the judgment shows that service of process was had in accordance with California Code Sec. 415.40." This section provides for service of process by mail when the Defendant has minimum contacts with California or is a domiciliary there. The Appeals Court said of Calhoun that it was argued prior to the clarifying amendments and thus had failed to consider the Court of competent jurisdiction requirements. (P.App.10a).

Col. Morton has consistently, from the inception of this case, alleged that

the Alabama judgment was not "regular on its face" as well as not meeting the criteria of "legal process" defined by 42 U.S.C. 659. The lower court did not feel the need to address the "regular on its face" issue after it found that "legal process" had not been met. The term is "legal process regular on its face", not just "regular on its face." Assuming, arguendo, that "regular on its face" were the only words of the statute to be considered, the question arises as to what is the "face" of the judgment. The "face" of the judgment is not the last document filed in a cause; it is the entire record of the case. Groth v. Ness, 260 N.W. 700 (1935). As stated in Application of Behymer, 130 Cal.App.200, 19 P.2d 829, "a judgment is 'void on its face' when its invalidity is apparent upon inspection of the judgment roll." See also Vaughn v. Vaughn, Ala.100 So.2d9. The case

of Pettis v. Johnson, 78 Okl. 277, 190 P. 681 (1920) cited for this definition gives a very scholarly discussion of voidable and void judgments. When the record shows that the initial service of process is void, a judgment based on such process is not "regular on its face" but is void.

The government relies heavily on the dissenting opinion of the court below. That reliance is also misplaced as the dissent went astray on several crucial points. The dissent states that an employer has no duty to litigate the validity of a pre-existing judgment on which garnishment is based but cites no authority for the statement. It further stated that there is no authority that an employer has a duty to raise defences of the employee. There is considerable authority for such position. Pounds v. Hammer, 57 Ala. 342; Badler v. L. Gillarde Sons Co. 387 Pa. 266, 127 A.2d 680.

The Government, as garnishee has a duty to assert all proper defenses of its creditor of which the Defendant has knowledge. 6 Am.Jur. 2d, Attachment and Garnishment, Sec.357 and Stewart v. Northern Assurance Co., 32 S.E. 218. The government had knowledge of the invalidity of the judgment in the case at bar. The government cites Alabama statutes which say that payment of money or property in the hands of the garnishee relieves the garnishee of all liability therefor to its creditor. The government in its Petition also cites many such statutes from other states. However, every such statute is predicated upon the fact that the court issuing the original judgment had jurisdiction of the person and the subject matter. Otherwise, those statutes would be authorizing the taking of property without due process of law. Jurisdiction of the subject matter and the parties is the threshold question of every cause of

action and the court must have jurisdiction of both. "A judgment rendered without such jurisdiction is in violation of the due process clause of the United States Constitution and is not merely voidable but void." 46 Am.Jur.2d Judgments, Sec.25 p.330. The Courts are agreed that if the judgment in a garnishment proceeding is void because of lack of either subject matter jurisdiction or jurisdiction over the Defendant, payment by a garnishee is no protection to him against a subsequent action by his creditor to recover the debt. 49 A.L.R.1411 Annotation-Garnishment-Void-Protection and which cites Louisville & N.R. Co. v. Nash, 118 Ala. 447, 23 So.825 (1897), and Southern R.Co. v. Ward, 123 Ala.400, 26 So.234 (1898), 38 C.J.S. Garnishment 293 (e) & (2). Thus, the government's reliance on the dissent which stated the majority opinion subjects the government

to greater liability and administrative burdens than are borne by private garnishees is in error. The government is not a mere stakeholder under the established law on this subject. If the government knows that the judgment is void, it has a duty not to honor a garnishment based on it and if it does, it's liable in a proper cause of action brought against it.

The dissent asserts that it's immaterial that Alabama had no long-arm statute (except U.R.E.S.A.) because of the judicially established law of Alabama. (P.30a). What the dissent and the government do not acknowledge is that the case referred to by the dissent is a tort case based on the Defendant doing business in Alabama. Alabama had a "long arm" statute for such cases as well as motor vehicle torts, Alabama Rules of Civil Procedure, Rule 4, Process, (b), B., C. (1973) but substituted service was allowed for divorce termination

(status) only. Alabama Rules of Civil Procedure, Rule 4, Process (c) (1) (B) (1973). (R.App.5a).

When a long-arm statute says divorce and does not include the terms alimony and child support, process pursuant to such statute is limited to adjudication of status and does not permit in personam judgments.

May v. Anderson, 345 U.S.520 (1953 ).

Divorce has long been severable from alimony, custody and child support.

The dissent also confuses void judgments with voidable judgments. "The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment itself coram non iudice and ipso facto void."

46 Am.Jur.2nd Judgments Sec.22. A void judgment is indeed void for every purpose and has no effect whatsoever. 46 Am.Jur.2d Judgments, Sec.49. It is the voidable judgment that needs to be set aside in the court from which it issued, not the void judgment 46 Am.Jur.2d Judgments, Sec.48.

Too, garnishment is merely ancilliary to the judgment and cannot exist without a valid judgment to support it. 6 Am.Jur.2d Attachment and Garnishment, Sec.11. It is not a separate case. No court proceeding is needed to set aside a void judgment. 46 Am. Jur. 2d Judgments, Sec.49. Therefore, the dissents dissertation on Relief From Void Judgments (p.31a, 32a, 42a), is inappropriate. Such applies to voidable judgments only.

Contrary to the dissent's and the government's argument that the majority's opinion destroys the intended purposes of 42 U.S.C. 659, the majority decision applies the statute so that 42 U.S.C. 659 is not constitutionally suspect by an interpretation that condones the taking of property without due process of law and in accord with the intent of the 1977 Amendment. Also contrary to the government's contention, the majority decision has construed 42 U.S.C.659 so that

its provisions are consistent. Throughout, it speaks of "court of competent jurisdiction". The limitation on the amount that can be garnished also refers to "court of competent jurisdiction", 15 U.S.C.1673 (R. App. 8a ).

Neither will the majority's decision cause chaos, nor an unmanageable burden for the government. The government states in its Petition that the salaries of 13,000 servicemen are being garnished but gives no explanation as to how they arrived at this number. It can only be assumed, then, that this number is the total amount of garnishments of all servicemen. This statement is glaring for its failure to state how many of these garnishments are based on ex-parte judgments. Ex-parte judgments are unusual to say the least. Of those garnishments in which the member or employee notifies the government of jurisdictional deficiency of the court, all the government

has to do is require the production of two extra documents attached to the divorce decree which will normally consist of two pieces of paper. The first of these is a copy of the return of process and the second, the law of the state regarding the process required. That is no large burden to place upon counsel for the Plaintiff to have to produce nor for the government to have to read. This is particularly true in the infinitesimal small number of ex-parte garnishments wherein the government has been notified that the issuing court had no jurisdiction. The government is required to make legal determinations, even in its own view of this matter. It cannot have escaped notice that Congress has, since this Morton case, enacted the "Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408. (R.App. 8a ). This Act in Section 1002 (a) Chapter 71 of Title 10 U.S.C. contains much of the same wording

as 42 U.S.C. 659 and although it has no application to the case at bar, it imposes duties upon the government that coincide, but to a much greater extent, with duties it would have under the majority opinion. Thus, the machinery is already required to determine far more extensive legal questions of the same or similar type that arose in this case.

The Staff Judge Advocate, at least in the Air Force, has assigned attorneys whose principal duties are to review state garnishments. (P.App.37a). To have to review two additional pages which can be read in only a minute should not be too great a burden for them to overcome. What these attorneys are saying is "it's not my job." It is their job. In ex-parte decrees based on minimum contacts the judgment has to set forth the jurisdictional facts it relied upon when entering the judgment. This should be very simple for the government.

All it has to do is require its members to set forth their domicile on their pay record and update it every six months. Surely, a certain very small percentage will be erroneously fed into the computer, but this cannot constitute chaos nor a gargantuan administrative burden to the government. Further, administrative burden has never been an excuse for denial of due process of law. "And when we enter the realm of 'strict judicial scrutiny', there can be no doubt that "Administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality." Frontiero v. Richardson, 411 U.S. 677, (1973).

The government argues it may have to pay twice. Not so. It can sue over against Mrs. Morton. The government is present where Mrs. Morton is and it doesn't have to travel anywhere. In fact, if the government had done that initially, this case would have terminated right then for it, but it

refused, even when requested to do so.

The government (P.App.15a) states, "It is costly for the wife to litigate in a distant state;" "It prevents husbands from evading payment by changing residences." It is absolutely astounding that the Solicitor General of the United States contends that this cause should be adjudicated on a gender basis. However, it is quite clear that such is their premise.

Does it really think that litigation for the husband in Alabama when he is in Alaska is cheap; or for that matter effective? Does it not know that wives forum shop and do so deliberately knowing a husband can't get to a hearing? The government is making this case into one of a gender based application of a federal statute. What the government is assuming in its argument (P15) is that a male (husband) can make or have money but a female (wife) is incapable of

making or having money. This is a real "put down" for females. However, such was put to rest in Orr v. Orr, 440 U.S. 268, (1979)

Further, if the government was to succeed in its contention, it would have to transfer every military member who is a defendant in a divorce suit to the forum for which such member's spouse may have carefully shopped, in order for the member to be able to litigate the matter. Such a case could take years. This case has already taken over five years. Otherwise, the members must forfeit their property on the strength of a void judgment because it's bothersome for the government to review questionable garnishments. A military member's body is not his or her own. He or she must be where he or she is ordered to be and where the exigencies of the service demand, not where some litigation is taking place. The doors of the Virginia

Courts were open to Mrs.Morton during all the years she and Col.Morton lived in Virginia and for a full nine months after she left him here.Sec.20-97 Virginia Code. (R.App. 114. She apparently was dissatisfied with Virginia law.

The Uniform Reciprocal Enforcement of Support Act adequately protects the spouse and children in need of support and also gives the obligor for support the right to a hearing. The government argues that the member who is retired may move. What the government fails to realize is that once there is a valid Uniform Reciprocal Enforcement of Support Act support order, it will support a garnishment. But, the government argues, prosecutors fail to prosecute under the Uniform Reciprocal Enforcement of Support Act. We are not here to argue merits of prosecutors. Some are very good and some are very bad. We are here to determine whether machinery is present to provide a judgment which will support a garnishment.

The government refers to a decision of the Comptroller General dated 2 February, 1982 (B-203668-Matter of Technical Sergeant Harry E. Mathews, USAF) and attaches a copy of the decision as its App.F. The Comptroller General refused to allow Sergeant Mathews to be reimbursed the amounts that had been taken from his pay between the dates that an ex-parte judgment had been rendered against him in Florida and the date that the Florida court ordered the garnishment set aside. The only basis for disallowing his claim was that the documents received by the Air Force Finance Center were "regular on their face". At no place in the opinion does the Comptroller General, who, although basically a financial administrative officer, has certain "quasi-judicial" responsibilities when he rules on requests of doubtful expenditures presented to him by finance officers, mention the basic legal issues

in these cases. That is, was the Writ valid legal process from a court of competent jurisdiction? The Comptroller General, like the Air Force, merely looked at the garnishment order and seeing the word "court" pronounced it "valid on its face".

The Comptroller General's decision, it is noted, was decided after the Court of Claims had decided this case, Morton v. U.S. decided December 14, 1981 (P.App.62a).

The Comptroller General completely ignores the opinion of Court of Claims where an ample discussion of jurisdiction of courts of competent jurisdiction appears. Administrative agencies, such as the General Accounting Office, are bound by decisions of the Court of Claims as well as all other Federal Courts. Yet, in the Mathews case they completely ignored the court's decision and adopted the position of the Air Force in their losing cause. The legal conclusions of the Comptroller General are entitled to

no weight in this case in the face of a contra decision of the Court of Claims. This case does serve to point out the difficulties of a military member out of state.

After the final decision was reached by the U.S. Court of Appeals for the Federal Circuit in the case at bar on May 17, 1983, (P.App. 1a), the government promulgated a new set of regulations which was published in the Federal Register, Vol. 48, No.110, Tuesday, June 7, 1983. According to the said publication "This revision expressly provides that agencies will not be required to ascertain whether the court or other authority which issued the garnishment order had obtained personal jurisdiction over the obligor prior to its issuance of the order." And, "Two Federal agencies submitted comments concerning the amendment to 5 CFS 581.305(f), which states that when a governmental entity receives legal process that appears to conform

to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

The amendment is consistent with the position that the government has taken in litigation concerning the issue." (Emphasis added). This amendment to the regulations which was promulgated after the final decision in this case is the one cited by the government in its Petition (P.App.99a,100a, 101a,102a). The government doesn't mention the fact that the regulations it puts in its Appendix were not the regulations as they read at the time this case was decided. So, it can only be assumed the government is trying to apply after the fact amendments retroactively to this case. This would hardly meet the requirement of fair play which is embodied in substantive due process.

The government's position concerning 42 U.S.C. 659 and particularly so in view of the 1983 amendments to the regulations, would authorize the taking of property without due process of law. Consequently, the entire system of garnishment of Federal employees' pay for arrearages in spousal and child support might very well fail to meet the constitutional test. The Appeals Court was correct in holding that a court should construe legislative enactments to avoid constitutional difficulties, if possible. U.S.v. Clark, 455 U.S.23, 34 (1980); U.S. v. Harris, 347 U.S. 612, 618 (1954); Blasecki v. City of Durham, 456 F.2d 89, 93, cert.denied 409 U.S. 912 (1972).

What the government is attempting to do by its 1983 revisions of the regulations, is to expand immunity contrary to that set forth in 42 U.S.C. 659(f). The government by regulation cannot change the definitions in the statute of alimony, child support,

nor the defined "legal obligations", which must exist pursuant to a decree, order, or judgment issued in accordance with applicable state law by a "court of competent jurisdiction." As we have seen, Alabama had no "long-arm" statute for alimony and child support when the Alabama court attempted to exercise in personam jurisdiction over Col. Morton in Alaska. A regulation cannot expand a statute beyond its clear words. To attempt to do so is not implementation of the statute but an attempt to legislate by the executive branch of the government. The July, 1983, regulations setting forth total immunity have expanded the qualified immunity set forth in the statute as amended in 1977.

The government attaches as Appendix 104a, a Memorandum Opinion in the appellate court of Rush v. United States, U.S. Supreme Court No. 83-382, without stating any of the relevant factual situation. This is most misleading. In truth, in the underlying

case on which garnishment was predicated, Mr. Rush was the plaintiff in the Florida court, pursued the action with vigor, and was represented by counsel. Mr. Rush thereby subjected himself to the jurisdiction of the Florida court, quite contrary to the factual situation in the case at bar. Col. Morton was not and never has been subject to the jurisdiction of the Alabama courts or law.

When Mr. Rush appeared in the Florida court he had a full opportunity to contest any jurisdictional issues in that court and the decree is not void and not subject to attack on jurisdictional grounds.

Johnson v. Muelberger, S.Ct.of U.S.(1951) 340 U.S. 581. Sherrer v. Sherrer, U.S.S.Ct. (1948), 334 U.S. 343. The matters of which Mr. Rush now complains are alleged errors within the Florida case itself after the court had jurisdiction over him. Such a judgment is not void but merely voidable

by the court that issued it upon application to such court. Even though there may have been grave irregularities within the Rush case itself, he cannot collaterally attack the judgment. It is now res judicata on all points that he could have raised in that proceeding as well as on appeal, because the Florida court had in personam jurisdiction over him. Once a court has in personam jurisdiction over a party in a divorce suit, such jurisdiction continues over the parties to carry out its orders in the same suit. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Sheffield v. Sheffield, 114 S.E.2d 771 (1966). The Rush case has no application to the case at bar.

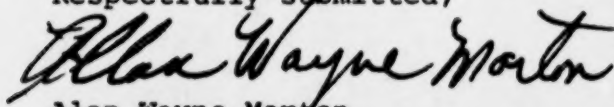
Although it was not argued in this case in the court below, it must be noted in passing that Virginia's garnishment procedure was held unconstitutional by the United States District Court for the Western District of Virginia, Charlottesville

Division in the case of Harris v. Bailey, Civil Action No. 81-0001-C on November 15, 1983, for Virginia's failure to provide for post-judgment notice and a hearing before garnishment of property. Alabama statutes, like Virginia's did not provide for a post-judgment notice and hearing before garnishing funds.

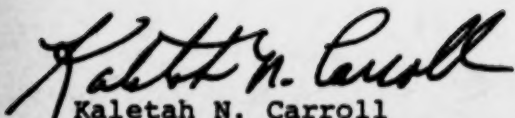
CONCLUSION

Wherefore the Respondent, Alan Wayne Morton, by Counsel, prays that this Honorable Court deny the Petition for Certiorari filed by the United States.

Respectfully submitted,



Alan Wayne Morton,  
by Counsel



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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 28th day of December, 1983, I mailed a typewritten copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, postage prepaid and properly addressed.

  
Kaletah N. Carroll

RESPONDENT'S

APPENDIX A

1. 37 U.S.C. 204 in relevant part reads:

Entitlement:

a) Except for members covered by section 202(i) of this title, the following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title -

1) a member of a uniformed service who is on active duty....

2. Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 42 U.S.C. 659 as initially enacted read:

"Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal Corporation) to any individual, including members of the Armed Services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations

to provide child support or make alimony payments. (Emphasis added).

4. The section of the Department of Defense Pay Manual in effect in 1975 reads as follows:

"a) Authority. Under the provisions of Pub.L.93-647, effective January 1, 1975, monies due from, or payable by, the United States to active duty members, members of the Reserve components not on active duty, and retired members (including members of Fleet Reserve and Fleet Marine Corps Reserves) are subject to court ordered garnishment or attachment when such members have been ordered by a court of competent jurisdiction (state or federal) to provide child support or alimony..." (Emphasis added).

5. 42 U.S.C.662 reads as follows:

'Definition'. For the purposes of Section 659 of this title -

(a)....

(b) The term 'child support', when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with state law) includes but is not limited to, payments to provide for health care, education, recreation, clothing or to meet other specific needs of such child or children; such term also includes attorney's fees, interest, and Court costs, when and to the extent that the same are expressly recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable state laws by a Court of competent jurisdiction. (Emphasis added).

(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means

periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance and spousal support, such term also includes attorney's fees, interest, and Court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order or judgment issued in accordance with applicable State law by a Court of competent jurisdiction..." (Emphasis added).

6. Alabama Rules of Civil Procedure, Rule 4, Process (b), B, B, in effect in 1974 read in pertinent part:

(B) Any non-resident person, firm, partnership general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein who shall do any business or perform any character of work or service in this state

shall by the doing of such business or the performance of such work, or services, be deemed to have appointed the Secretary of State, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service or relating to or as an incident thereof, by any such non-resident, or his, its or their agent, servant or employee...."

(C) Any non-resident who operates a motor vehicle on a public highway in this state, or who owns a motor vehicle operated on a public highway in this state by such non-resident, or his, their or its agent, provided that the authority of the Secretary of State to receive service of process for such non-resident shall be limited to process in actions against such non-

residents growing out of any accident or collision in which such non-resident, or the motor vehicle owned by such non-resident, shall be involved while being operated on a public highway of this state and provided further that this provision shall not apply to any foreign corporation that is qualified under the Constitution and laws of this state as to doing business herein, and has designated and has and is maintaining at such time an authorized agent or agents residing in this state upon whom service can be had."

7. Alabama Rules of Civil Procedure, Rule 4, Process (c)(1)(B) in 1973 for divorce read as follows:

(c) Substituted Service. One or more methods of substituted service is provided for under these rules and the laws of this state including, but not limited to, the following proceedings and occasions and all such statutes remain in effect whether

or not set out herein.

(1) Statutes

... (B) Divorce. In actions involving divorce, service may be made as provided in Tit. 34 § 23, Code of Ala."

8. 15 U.S.C.1673, reads as follows:

"§1673. Restriction on garnishment

Exceptions

(b) (1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review..."

9. 10 U.S.C. 1408 reads in pertinent part as follows:

(a) I n this section:

"(1) 'Court' means --

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands:

"B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

"C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

"(2) 'Court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or

legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree], which -

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for -

"(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C.662(b)))";

"(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C.662(c)))";...

"(D) The court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App.501 et seq.) were observed; and

"(2) a court order is regular on its face if the order -

"(A) is issued by a court of competent jurisdiction;

"(B) is legal in form; and

"(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law...."

10. Virginia Code Sec.20-97 reads in pertinent fact, as follows:

Domicile and residential requirements for such suits:- No suit for annulling a marriage or for divorce shall be maintainable, unless one of the parties is domiciled in, and is and has been an actual bona fide resident of this State for at least six months preceding the commencement of the suit; nor shall any suit for affirming a marriage be maintainable, unless one of the parties be domiciled in, and is and has been an actual bona fide resident of this State at the time of bringing such a suit. For the purposes of this section only, if a member of the armed forces of the United States

has been stationed in this State and has lived with his or her spouse for a period of six months or more in this State next preceding a separation between such parties, and such service person or spouse continue to live in this State until and at the time a suit for divorce or legal separation is commenced, then such person and his or her spouse shall be presumed to be domiciled in and to have been a bona fide resident of this State during such period of time...."